



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

March 4, 2009

ELECTRONIC & FIRST CLASS MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Portals
Washington, DC 20554

Received & Inspected

MAR - 6 2009

FCC Mail Room

**RE: Docket No 96-45, DA 08-2779
TracFone Wireless, Inc. Petition For Modification Of
Public Safety Answering Point Certification Condition**

**Docket No. 96-45, DA 07-4983
Virgin Mobile USA, L.P.'S Petitions For Forbearance And
Designation As An Eligible Telecommunications Carrier In
The State Of New York And The Commonwealths Of
Pennsylvania And Virginia**

Dear Ms. Dortch:

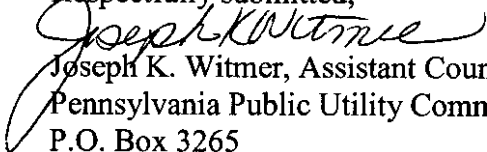
The Pennsylvania Public Utility Commission (PaPUC) files an original and four copies of the PaPUC Answer and Answer in Opposition (Answer) under 47 CFR 1.724(b)-(c) and 1.727(d)-(e). The Answer responds to the Motion for Partial Dismissal and Ex Parte Letter filed by TracFone Wireless, Inc. (TracFone) on March 2, 2009 in these dockets.

The Proposed Order is in hard copy and on computer disk as required by Section 1.724(b)-(c) and 1.727(d)-(e) and 1.734(d). The disk is "read only" in the *Word* and *Adobe Acrobat* formats used by the FCC's electronic filing system.

The PaPUC Answer is also on the computer disk as "read only" in the FCC's *Word* and *Adobe Acrobat* formats. The "Attachments" could only be provided in *Adobe Acrobat*.

As permitted by Section 1.735(f)(3), the PaPUC provided a copy electronically to Counsel for the Parties, the FCC, the Telecommunications Access Policy Division, and the FCC's duplicating contractor no later than 5:30 p.m. and in compliance with the Notices in DA 08-2779 and DA 07-4983. The PaPUC also provides a hard copy as well. The FCC Commissioners and staff also received the electronic and hard copy.

Respectfully submitted,


Joseph K. Witmer, Assistant Counsel
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-3663

cc: Pennsylvania Emergency Management Agency

No. of Copies rec'd 044
List A B C D E

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Received & Inspected

MAR - 6 2009

FCC Mail Room

In the Matter of)

Petition of TracFone Wireless, Inc.)
For Modification of Public Safety Answering)
Point Modification)

CC Docket No. 96-45
DA 08-2779

Virgin Mobile USA, L.P.'s Petition)
For Forbearance and Designation as)
An Eligible Telecommunications Carrier in)
The State of New York and the)
Commonwealths of Pennsylvania and Virginia)

CC Docket No. 96-45
DA No. 07-4983

**ANSWER OF
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pursuant to 47 CFR §1.724(a), the Pennsylvania Public Utility Commission (PaPUC) files this written Answer in response to the TracFone Wireless, Inc. Motion for partial Dismissal and Response to Ex Parte Submission (TracFone Motion).¹ The PaPUC appends a Proposed Order required by Section 1.724 but seeks staff waiver for good cause shown evident in the short time for filing.

¹ TracFone Wireless, Inc. Motion for Partial Dismissal and Response to Ex Parte Submission, March 2, 2009. To their credit, TracFone provided a copy of this pleading to the PaPUC, unlike every other formal pleading filed with the FCC in this ongoing TracFone Forbearance/Pennsylvania ETC Designation case.

Summary

Pursuant to Section 1.724(j) the PaPUC also seeks staff waiver for the procedural noncompliance of any party, including the Section 1.724 obligation to append a Proposed Order and the Section 1.727(b) and (c) obligation of a party filing a Motion to append findings of fact and conclusions of law in a proposed Order with their Motion. Good cause for waiver of that rule is appropriate given the time constraints and the parties' familiarity with the issues. The PaPUC does not believe that good cause exists to waive any other noncompliance of TracFone.

The PaPUC asks the FCC to deny the TracFone Motion, deny the TracFone Modification Petition,² grant the Pennsylvania Emergency Management Agency ("PEMA") Petition addressing TracFone's "self certification" of compliance with Pennsylvania law,³ and deny the Virgin Mobile Forbearance Petition.⁴ The PaPUC asks the FCC to rescind on its own motion,⁵ or preferably after notice and comment, the 2005 Forbearance Decision⁶ because the predictive effect in 2009 is not what was anticipated in 2005.

² TracFone Wireless, Inc. Petition for Modification of Public Safety Answering Point Certification Condition, November 21, 2008; TracFone Supplement to Petition for Modification (December 23, 2008). The PaPUC has yet to receive a copy of any of these pleadings.

³ The PaPUC does not want to be accused of filing inconsistent pleadings. The PaPUC's Ex Parte Letter dated February 26, 2009 asked the FCC to deny the PEMA Petition. The PaPUC made that request so that the PaPUC can address that issue for Pennsylvania now that the PaPUC will be making wireless ETC designations in Pennsylvania. However, if the FCC decides that TracFone's ETC designation is somehow beyond consideration by the PaPUC, the PaPUC alternatively urges the FCC to grant the PEMA petition. The proliferation of procedural anomalies and inconsistent statements by TracFone throughout this entire proceeding warrants that express clarification.

⁴ The PaPUC now takes a different position on Virgin Mobile's ETC Designation petition for Pennsylvania. This action is appropriate to avoid prejudice to Virgin Mobile now that the FCC is dismissing the Virgin Mobile petition without prejudice based on the fact that Pennsylvania, like Florida in the *April 2008 ETC Order*, is asserting jurisdiction to make wireless ETC designations in Pennsylvania.

⁵ TracFone cannot be heard to raise concerns about the FCC acting *sua sponte* to remove a benefit when the benefit was obtained from *sua sponte* action. The PaPUC recognizes that notice and comment on matters of general rulemaking may warrant notice under federal law notwithstanding previous *sua sponte* action.

⁶ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23 (2005 Forbearance Order).

The PaPUC also asks the FCC to hold that the April 2008 ETC Order does not apply to Pennsylvania. Item #4 on the April 3, 2008 Public Agenda Notice of the FCC addressed several pending TracFone ETC petitions although *Pennsylvania* was not listed as a jurisdiction subject to action by the FCC. The PaPUC's detailed filing addressing TracFone in Pennsylvania was not filed to avoid even the appearance of impropriety that could arise if the PaPUC submitted a pleading on a similar matter during the "blackout period" triggered by listing on the FCC's Public Agenda. However, Pennsylvania later learned, to its dismay, that the *April 2008 ETC Order* included Pennsylvania.⁷

In the alternative, if the April 2008 ETC Order is held to apply, the PaPUC asks the FCC to find that TracFone's actions warrant modifying that decision for TracFone to remove ETC designation for Pennsylvania, and that the removal contain an accompanying determination that ETC designations and related matters will be decided by the PaPUC in Pennsylvania.

1. The PaPUC's Relief is Consistent with prior FCC precedent and TracFone should not circumvent that precedent with special treatment relief.

The PaPUC's requested relief is entirely consistent with the FCC's precedent in the 2005 Forbearance Order and the April 2008 ETC Order. The 2005 Forbearance Order held that the FCC will revisit forbearance based on predictive effect.⁸ The April 2008 ETC Order was limited to the FCC's Public Agenda notice of April 3, 2008. Since that notice did not list Pennsylvania as a

⁷ Compare FCC Public Agenda Meeting Notice (April 3, 2008) with *In the Matter of Joint Board on Universal Service, TracFone Wireless Petitions for ETC Designation in New York, Florida, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia*, Docket No. 96-45 (April 9, 2008) (*The April 2008 ETC Order*).

⁸ 2005 Forbearance Order, para. 6, n. 25.

jurisdiction subject to action, the FCC's subsequent Order should not be considered as having made any ETC designation for TracFone in Pennsylvania. Alternatively, however, if the FCC did grant any kind of ETC designation reflected in Paragraph 16 of April 2008 ETC Order, that designation imposed requirements on TracFone for Pennsylvania.

TracFone now attempts to circumvent noncompliance with those Pennsylvania requirements with yet another request seeking special relief based on unsupported allegations about "other motives" in the PaPUC's position. This is patently untrue. The PaPUC believes that TracFone's problems with Pennsylvania can be more efficiently and factually addressed in Pennsylvania by the PaPUC now that the PaPUC has asserted wireless ETC jurisdiction.

2. The FCC's 2005 Forbearance Order and the April 2008 ETC Order do not apply to Pennsylvania.

PaPUC is not convinced that the April 2008 ETC Order was intended to include Pennsylvania. As stated earlier, the April 2008 ETC Order reflected several state-specific ETC Designation petitions listed on the April 3, 2008 Public Meeting Agenda. The Public Meeting Agenda notice of April 3, 2008 did not list Pennsylvania. The subsequently issued April 2008 ETC Order, however, mistakenly included Pennsylvania, specifically in Paragraphs 15 and 16.

Were it otherwise, the inclusion of Pennsylvania with other state-specific proceedings without notice on the FCC's Public Meeting Agenda is an anomalous procedure. Equally important, as the PaPUC has reiterated a number of times, there is no evidence that TracFone has complied with the FCC requirements in the April 2008 ETC Order or that TracFone informed the PaPUC of the filing. The FCC should not attempt to rectify an understandable ministerial error that

addressed Pennsylvania in the April 2008 ETC Order by ratifying TracFone's ongoing violation of FCC filing and notice requirements.

The 2005 Forbearance Order was based on an FCC Public Notice of June 24, 2004 that focused primarily on ETC Designation in the State of New York.⁹ The public would reasonably conclude that the matter involved only New York, including the accompanying forbearance petition. Consequently, the 2005 Forbearance Order arguably limited denial of ETC Designation and the grant of forbearance to New York.

Alternatively, a determination that the forbearance granted was national in scope puts the FCC in the anomalous position of first asking for comment on a state-specific petition and then embedding an issue of national importance in the same notice. If the FCC did that, the FCC also seems to have provided a backstop option for that anomalous result by reserving the right to reconsider the forbearance decision based on predictive effect. So, even if the 2005 Forbearance Order applies outside New York, the predictive effect outside New York now warrants reconsideration of that 2005 Forbearance Order.

The PaPUC reiterates, again, that the only way the PaPUC learned about TracFone's ETC petition for Pennsylvania was based on publication in the Daily Digest of January 9, 2008. The PaPUC was unwilling to file a response because that could have violated the "black out" period triggered by listing similar ETC petitions involving TracFone on the Public Meeting Agenda dated April 3, 2008. The "black out" period prohibits filing after an item is listed on the Public Agenda.

⁹ See FCC Public Notice, *Parties are invited to Comment on TracFone Wireless' Petition for Designation as an Eligible Telecommunications Carrier in the State of New York and Petition for Forbearance From Application of Section 214*, Docket No. 96-45, DA 04-1822 (June 24, 2004).

The PaPUC anticipated submitting its views, including TracFone's apparent noncompliance with an FCC mandate to provide a copy of its FCC pleading to the PaPUC even though the FCC required TracFone to provide a copy to the PaPUC in the FCC's January 9, 2008 Public Notice. The PaPUC never anticipated that the FCC's subsequent Order following notice in the Public Meeting Agenda would include Pennsylvania. This effectively prevented the PaPUC from ever submitting any comprehensive filing on TracFone's machinations until TracFone filed the Modification Petition.

Even if the 2005 Forbearance Order and the April 2008 ETC Order apply to Pennsylvania, TracFone's reliance on noncompliance and anomalous processes to secure forbearance and ETC Designation in Pennsylvania has caused problems not otherwise predicted when the FCC issued those orders. TracFone's problems do not arise because the PaPUC has "other agendas" or because the PaPUC wants to "impede the availability of that service" as TracFone alleges.¹⁰

3. *The TracFone Allegations are Meritless and Warrant Dismissal without Discussion.*

The TracFone Motion is one more pleading that attempts to obscure TracFone's non-compliance with FCC mandates in Pennsylvania with a misrepresentation of the facts. TracFone continues to misrepresent the PaPUC's concerns as an alleged effort to "retard the certification process" with a "centerpiece" claim about "drive testing" in Pennsylvania. This is untrue.

¹⁰ *TracFone Motion for Partial Dismissal*, p. 6.

a. TracFone Violated FCC Requirements Related to ETC Designation, including any ETC Designation for Pennsylvania.

TracFone continues to blatantly ignore FCC requirements. TracFone has assiduously avoided any discussion about the PaPUC's allegations regarding their flagrant violation of several legal requirements. These include the FCC notice and consultation with state commissions imposed on carriers as preconditions to securing ETC designation from the FCC. This also includes the ongoing failure to secure the required documentation from the PaPUC or provide the PaPUC with notice and copies of TracFone's ETC machinations involving Pennsylvania.

The PaPUC previously demonstrated that TracFone never consulted with the PaPUC as part of an effort to secure an ETC designation in non-tribal lands as required by Paragraph 92 of the *12th Report and Order*. The PaPUC also demonstrated that TracFone failed to attach the carrier-specific notification from a state commission, in this case the PaPUC, required by Paragraph 113 of the same *12th Report and Order*. In fact, TracFone appended a non-binding statement applicable to another carrier to mislead the FCC into concluding that the PaPUC addressed TracFone's request. This was a flagrant violation of Paragraph 113 of the same *12th Report and Order*. Paragraph 113 provides in pertinent part:

We conclude that an "affirmative statement" of the state commission may consist of any duly authorized letter, comment, or state commission order indicating that it lacks jurisdiction to perform designations over a particular carrier. Each carrier should consult with the state commission to receive such a notification, rather than relying on notifications that may have been provided to similarly situated carriers.

TracFone has yet to produce for the FCC or the PaPUC any record evidence that it complied with any of these FCC mandates. The reason is quite simple: TracFone simply ignored the FCC's requirements and preferred to rely on misleading statements. TracFone continues to do this today.

The PaPUC also notes that the FCC specifically ordered TracFone to provide a copy of their ETC Petition to the PaPUC in the FCC's Public Notice of January 9, 2008 at DA 08-57. TracFone has yet to produce any record proof that it ever complied with this specific mandate.

This is not the first time that the PaPUC raised these issues. TracFone is well aware of this evidence of substantial noncompliance with FCC mandates that involve Pennsylvania. TracFone now prefers to evade this concrete noncompliance with vague allegations about "other agendas" or statements about "drives testing" as though "drive testing" were the only concern.

b. TracFone's Pleadings on Pennsylvania Issues and the PaPUC's Actions are Contradictory, Inconsistent, and Borderline Defamatory.

Having avoided discussion about compliance with FCC legal mandates, TracFone next avoids discussion on important Pennsylvania issues with contradictory and inconsistent statements.

For example, the Pennsylvania Office of Consumer Advocate (Pa. OCA) and the Pennsylvania Chapter of the National Emergency Number Association (PaNENA) filed Comments in the ETC designation proceeding seeking to ensure

that TracFone would comply with Pennsylvania's statutory mandate to remit payments to support 911. TracFone claimed that there was no noncompliance.¹¹

Then, after TracFone faced problems complying with Pennsylvania law addressing a wireless carrier's funding obligation to support 911, TracFone submitted an Ex Parte filing on January 15, 2009. The notice vaguely referenced some discussions with FCC staff about collecting 911 fees from users of wireless services. The PaPUC raised then, and reiterates today, that TracFone's solution raise serious concerns about their compliance with the obligation under Pennsylvania law to provide funding support for 911 under 35 Pa.C.S. § 7021.4 *et seq.*

Although that statutory provision is not within the PaPUC's regulatory enforcement authority, the filing by the PEMA, a regulatory body involved with 911 in Pennsylvania, vividly illustrates TracFone's problem complying with Pennsylvania law. This is well beyond a "centerpiece" focus on drive testing as TracFone now alleges.

The current state of the pleadings demonstrate TracFone's recognition that there is a real legal dispute about TracFone's compliance with state law, effectively negating any "self certification" previously filed by TracFone. TracFone attempts to blur this issue about compliance with Pennsylvania law with borderline defamatory statements alleging that "other agendas underlie those entities' opposition and lack of cooperation in the PSAP certification process"¹² -- as though the PaPUC's filings and concerns are driven by some nefarious intent. These are unfounded allegations that attempt to undermine the credibility of state

¹¹ *TracFone ETC Designation for Pennsylvania*, Docket No. 96-45, Reply Comments (February 26, 2008), pp. 3 and 5.

¹² *TracFone Motion*, p. 6 and n. 6.

government agencies that are statutorily entrusted with the protection of the health and safety of the public.

At the very least, the “predictive effect” in the 2005 Forbearance Order did not envision flagrant noncompliance with FCC mandates, blatantly misleading statements about state commission involvement with TracFone’s ETC Designation, contradictory statements to consumers about what minutes they were getting, and scandalous allegations that impugn a regulatory agency’s credibility – especially in the absence of concrete facts to support any of them.

The predictive effect of the 2005 Forbearance Order is clearly different now than what the FCC expected in 2005, at least for Pennsylvania. The vast gap between regulatory expectations in 2005 and TracFone’s 2009 facts warrant revisiting that 2005 Forbearance Order. TracFone is well aware of the PaPUC’s view. That position is not news to TracFone.

TracFone’s reliance on the April 2008 ETC Order is equally misplaced. Pennsylvania was not included within the scope of that decision. Assuming, otherwise, *arguendo*, TracFone’s inability to comply with FCC conditions imposed in that order cannot be cured by special treatment.

TracFone is currently the *only* wireless reseller that obtained an ETC designation without owning any facilities. TracFone is currently the *only* wireless reseller that consistently demonstrates an inability to comply with state laws. This includes, but is by no means limited to, the funding obligation to support 911. Another TracFone misapprehension is the mistaken view that the PaPUC is somehow involved in ensuring PSAP certification. The PaPUC learned of this

dispute the same way it learned about TracFone's earlier ETC machinations, from the Daily Digest.

c. TracFone's claims about benefits to lower-income consumers are misleading and raise serious issues concerning Section 254.

TracFone's Motion contains effusive claims about the benefits that lower-income Pennsylvanians will obtain from TracFone's service. First, TracFone claims that it is expanding service to some of the "most economically-depressed communities in Pennsylvania" – including Pittsburgh and other portions of western Pennsylvania, Erie and the Johnstown-Altoona area.¹³ Then, TracFone claims that the Philadelphia County PSAP has somehow delegated its certification obligation to a consumer advocate, that its agreement to do testing cost a lot of money but attained no results, and that some 450,000 eligible consumers in Philadelphia are being denied the benefits of TracFone's services.¹⁴

These factual misrepresentations demonstrate a lack of understanding about how 911 operates in Pennsylvania and reinforce the wisdom of having the PaPUC address wireless ETC matters going forward.

TracFone also fails to address a legal issue, previously raised by the PaPUC, involving Section 254 of TA-96. The PaPUC has voiced concern that Section 254 may not be intended to federally fund reductions in service quality and consumer protections for lower-income consumers.

That result appears to sacrifice affordability to comparability. That would occur when a wireline Lifeline consumer choosing wireless Lifeline service gets

¹³ *TracFone Motion*, p. 7.

¹⁴ *TracFone Motion*, p. 7 and Attachment, "Free cell phone service gets static from city," www.phillytrib.com/tribune/

very limited calling, no discount on unlimited local calling plans, and no recourse to the PaPUC for inadequate service.

TracFone inconsistently informs consumers about what they actually receive from TracFone's wireless Lifeline service. TracFone tells consumers in a Press Release that they will get 68 free minutes. TracFone then tells consumers that use their website that the consumer will get 42 free minutes.¹⁵ TracFone consistently informs consumers of the right to use their very limited resources to buy more minutes. There is currently no recourse to the PaPUC because the PaPUC has refrained from exercising federally granted authority to address "terms and conditions" for wireless service at 47 USC § 332.

The PaPUC appreciates the FCC's conclusion that services providers like TracFone are desirable because they provide "increased consumer choice" and "high-quality service" and "mobility" – but those are not mandates under Section 254(b) of TA-96. The PaPUC realizes that the FCC may believe that this service provides "comparable" service for wireless Lifeline consumers compared to wireline Lifeline consumers or other non-Lifeline wireless consumers.

This conclusion, however, relies on non-statutory criteria and the result elevates the principle of "comparability" over the other universal service principles, an approach already rejected by the federal courts.¹⁶ Moreover, none of the other principles, particularly affordability, are balanced against this apparent preference for the "comparability" principle.

¹⁵ TracFone's press release touting TracFone's wireless Lifeline service in Pennsylvania states that TracFone's consumer get 68 "free" minutes of calling. A consumer that uses TracFone's www.safelink.com website, however, is told that the consumer gets 42 "free" minutes. See Attachment A to the PaPUC Answer contains this documented research.

¹⁶ *Qwest Communications v. FCC*, 398 F.3d 1222, 1234 (2005).

d. TracFone Makes Factual Misstatements About PSAP Operators And Inconsistent If Not Discriminatory Commitments to Pennsylvania PSAP Operators.

TracFone makes several inaccurate factual statements about Philadelphia. Lance Haver is currently the Director of the Mayor's Office of Consumer Affairs for the City of Philadelphia. The PaPUC is familiar with Mr. Haver given his long-standing role as a consumer advocate in the Philadelphia metropolitan area. Mr. Haver's consumer advocate office may be an administrative adjunct to the Mayor's Office but that is not the same thing as the PSAP operator for the County of Philadelphia. TracFone conflates the Mayor's Office for Philadelphia City with the Philadelphia County PSAP operator. This is a misstatement that furthers some untenable claim that the County of Philadelphia somehow improperly "delegated" PSAP certification to a "quasi governmental entity" -- the Mayor's Office.

TracFone's Attachment A to the TracFone Motion for Partial Dismissal suggests that the Philadelphia PSAP has refused to grant certification because of some failure to comply with FCC testing mandates. However, general media coverage does not accurately reflect concerns about an alleged refusal to address the requirement in Paragraph 6(a) of the 2005 Forbearance Order that requires TracFone to provide its Lifeline customers with 911 and E911 access regardless of activation status and the availability of prepaid minutes. The same general media coverage does not accurately or adequately explain the equally plausible suggestion that TracFone's failure to comply with the ancillary obligation to give its Lifeline customers E911-compliant handsets means that TracFone cannot get the PSAP certification it seeks and for a very good reason, public safety.

On the other hand, TracFone's Attachment A to their Motion contains statements alluding to TracFone's willingness to provide the County or City of

Philadelphia with their handsets and to shoulder the considerable cost to conduct the required drive tests. This stands in marked contrast to TracFone's apparent unwillingness to conduct the same kind of testing in Monroe County, Pennsylvania.¹⁷

The PaPUC's Reply Comment elaborated on the importance of drive testing. TracFone seems to recognize that for Philadelphia County but not for Monroe County.¹⁸ TracFone provides no explanation for this discrepancy nor does TracFone explain why these disparate commitments are not discriminatory.

It is inexplicable that commitments made to undertake testing to ensure public safety in Philadelphia County are less important and more burdensome, if not outright refused, in other Pennsylvania counties.

TracFone fundamentally fails to understand that individual counties and two other urban PSAPs, not the PaPUC, ensure 911 public safety. TracFone does, however, apparently understand the importance of economies of scale in numbers given their reference to 420,000 eligible consumers in Philadelphia County compared to no disclosure on the number of eligible consumers in other counties like Monroe.

e. TracFone Makes Inconsistent Statements About The Facilities That Will Be Used To Provide Wireless Lifeline Service.

Importantly, TracFone never addresses the contradictory claims about whose facilities TracFone is using in Pennsylvania. On the one hand, TracFone

¹⁷ *TracFone Modification Petition*, Docket No. 96-45, PaPUC Letter Comment (January 6, 2009), Monroe County, Pennsylvania, letter.

¹⁸ *TracFone Modification Petition*, Docket No. 96-45, PaPUC Reply Comments (January 13, 2009), pp. 4-5

alleges it uses only AT&T Facilities. TracFone now claims that it is using multiple providers.

In an AT&T Letter dated September 22, 2008 provided to unidentified "Pennsylvania" entities, AT&T stated that with respect to any TracFone customer whose service is activated on the AT&T network and who dials 911, such customer will have the same access to E911 as a retail customer of AT&T wireless services.¹⁹

On October 17, 2008, TracFone claimed, in a submission to a Pennsylvania county from its counsel, that TracFone's supplier was AT&T. AT&T was "the sole network to be used in connection with TracFone's Lifeline program." This seems to be consistent with the September 22, 2008 AT&T letter.²⁰

However, on March 2, 2009, TracFone's Motion on page 4 makes a completely different claim. Now, TracFone claims that it uses multiple networks from multiple vendors. TracFone states:

TracFone provides service to its customers, including its Lifeline customers, by utilizing the networks of its underlying carrier vendors, all of whom are subject to applicable federal and state 911/E911 requirements; all of whose networks have been drive tested in Pennsylvania, all of which have been found to reliably deliver 911 calls to PSAPs.²¹

The PaPUC previously raised concerns regarding what facilities are being used in areas where AT&T lacks facilities. The PaPUC was concerned that claims

¹⁹ *AT&T Correspondence of September 22, 2008*, Attachment B to this PaPUC Answer.

²⁰ *TracFone Correspondence dated October 17, 2008*, Attachment B to this PaPUC Answer

²¹ *TracFone Motion*, p. 4.

to seek ETC Designation throughout Pennsylvania could be a problem, particularly in areas where AT&T does not have facilities to provide wireless service. TracFone continues to evade this issue as well.

These kinds of misstatement of facts, contradictory commitments on services provided to consumers about how many minutes they actually get, and misleading pleadings seem endemic to TracFone, at least in the absence of some formal proceeding before the PaPUC to address important public safety and FUSF matters.

The burden is on state commissions, at the very least, to undertake a detailed search and contact with multiple entities to gather the information to address these concerns. Those concerns are better presented by parties with detailed knowledge of the facts when they present their concerns to the PaPUC as opposed to the FCC.

4. The PaPUC's Secretarial Letter of February 26, 2009 Did Not Deny TracFone Due Process and Is Consistent with Pennsylvania Law.

As a last resort, TracFone raises allegations about due process and Pennsylvania law.²² This allegation is without merit.

Pennsylvania precedent distinguishes between issuing rules of general applicability (legislative rulemaking function) and case-specific determinations (adjudicatory function). *Redmond v. Commonwealth Milk Marketing Board*, 363 A.2d 840, 843 (1980).

²² *TracFone Motion*, p. 2, n. 1.

There was simply no adjudication in this proceeding. There could not have been any adjudication because TracFone never filed any petition with the PaPUC. TracFone never sought any determination on ETC Designation in Pennsylvania from the PaPUC despite an FCC mandate requiring it to do so.

TracFone fully realizes that the PaPUC and the FCC recognize the importance of avoiding the announcement of rules of future applicability in a specific adjudication. For that very reason, TracFone was required to provide the PaPUC with notice and an opportunity to be heard before filing any petition with the FCC. TracFone failed to do that. To make matters worse, TracFone failed to comply with a subsequent FCC mandate to notify the PaPUC about the pending ETC petition. The FCC imposed that in the FCC's January 8, 2008 Public Notice.

TracFone cannot be heard to complain about some alleged denial of due process. Any denial of due process is directly attributable to TracFone's actions.

Moreover, the Secretarial Letter of February 26, 2009 was in the nature of a general pronouncement on an issue of law addressed in a Declaratory Order. Section 331(f) of the Public Utility Code authorizes the PaPUC to issue declaratory orders in its sound discretion. That discretion was appropriate here.

Pennsylvania does not mandate notice and opportunity to be heard when there is no adjudication or there are no issues of fact. *Guthrie v. Borough of Wilkesburg*, 478 A.2d 1279 (Pa. 1984); *Lehigh Valley Power Committee v. PaPUC*, 563 A.2d 548 (Pa. Cmwlth. 1989).

There was no adjudication. There were no contested facts before the PaPUC. The issue before the PaPUC was a legal issue involving the assertion of

jurisdiction to make ETC designations in Pennsylvania. The PaPUC reached a legal determination to assert jurisdiction to make wireless ETC designations. But, even assuming otherwise, *arguendo*, it was TracFone's own action that denied TracFone any right to due process that it would have had on an issue of law.

Finally, Pennsylvania law holds that a due process right to notice and an opportunity to be heard before an action is taken can be obviated based on the necessity of quick action or the impracticality of providing any meaningful opportunity to be heard. However, the action must be coupled with some meaningful means of assessing the propriety of an action after the fact. This can satisfy any procedural due process requirement. *Parratt v. Taylor*, 451 U.S. 527 (1981), quoted in *Shah v. State Board of Medicine*, 589 A.2d 783, 788-789 (Pa. Cmwlth. 1991), *appeal denied*, 600 A.2d 197 (Pa. 1991).

The PaPUC and the FCC face an impending forbearance deadline under Section 160(c) of TA-96. The FCC is jointly addressing two ETC Designation issues involving Pennsylvania. The PaPUC has expressed similar concerns in both proceedings. The need for quick action and the impracticality of a prolonged proceeding given the pending statutory deadline obviated any due process right TracFone would have even if TracFone's actions are the direct cause of the denial of any residual due process right. Most importantly, however, the PaPUC has authority under Section 703(f) and (g) of the Public Utility Code which allows TracFone to ask the PaPUC to rehear, rescind, or amend the applicability of the Secretarial Letter to TracFone.

The narrow legal issue decided by the PaPUC, TracFone's actions, and the availability of a meaningful means of assessing the propriety of the action after the fact for TracFone warrant dismissing TracFone's due process allegation.

Summary

The aforementioned concerns underscore the wisdom of having the PaPUC address all ETC designations and related matters in Pennsylvania. The FCC has national issues to manage.

TracFone's inconsistent pleadings and misstatements of fact about Pennsylvania are not matters of national importance. TracFone appears to be alone in its inability to comply with state law and FCC requirements.²³

The 2005 Forbearance Decision and the April 2008 ETC Order allow TracFone to get ETC money without bothering with the statutory and regulatory obligation to own facilities.

TracFone is currently the *only* wireless reseller provider that obtained, *sua sponte* from the FCC, forbearance from the FCC's regulations at 47 CFR 54.201(d). The rule requires a carrier to own at least some facilities as a precondition to ETC designation.²⁴

TracFone is currently the *only* wireless reseller provider who receives federal universal service (FUSF) support to provide Lifeline service without the ancillary statutory obligation under Section 214(e)(1)(A) of TA-96 to own at least

²³ Following submission of the February 26, 2008 Ex Parte, counsel for Virgin Mobile contacted the PaPUC about ETC designations. Virgin Mobile, another wireless reseller without facilities that also seeks forbearance, reiterated their willingness to conduct the PSAPs' necessary testing and to comply with the wireless carrier obligation to support 911 imposed on those carriers under Pennsylvania law. These verbal representations vividly illustrate TracFone's situation vis a vis similarly situated wireless reseller carriers even though, to be sure, the PaPUC has continued to oppose any further forbearance from the Section 254 obligation to own at least some facilities in order to get ETC designation.

²⁴ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23

a portion of the facilities used to provide FUSF supported services. There is no reason to continue this error in perpetuity given that the predictive effect is other than what was anticipated in 2005. There is no reason to compound the error through multiple designations for carriers similar to TracFone.

The PaPUC also believes that the entire Forbearance/ETC Designation issue involving Pennsylvania and TracFone illustrate, as the PaPUC has said in the pending Forbearance NPRM, the need for regulatory requirements, including a “complete as filed” requirement, in forbearance proceedings. Other results create avoidable legal and policy issues, including TracFone’s ongoing efforts to secure benefits despite the unwillingness to comply with FCC and state requirements.

Conclusion

For the following reasons, the PaPUC asks the FCC to deny the TracFone Motion, deny the pending TracFone Modification Petition²⁵, grant the PEMA Petition on TracFone’s “self certification” of compliance with Pennsylvania law, and deny the Virgin Mobile Forbearance Petition.²⁶

The PaPUC asks the FCC to rescind or modify on its own motion,²⁷ or preferably after notice and comment, the 2005 Forbearance Decision.²⁸ In the

²⁵ TracFone Wireless, Inc. Petition for Modification of Public Safety Answering Point Certification Condition, November 21, 2008; TracFone Supplement to Petition for Modification (December 23, 2008). The PaPUC has yet to receive a copy of any of these pleadings.

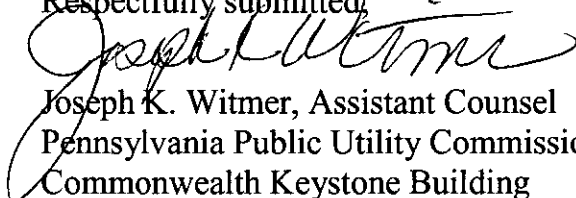
²⁶ The PaPUC takes no position on Virgin Mobile’s ETC Designation petition for Pennsylvania. This is appropriate to avoid prejudgment now that, as occurred with Florida in the *2008 ETC Order*, the FCC must dismiss without prejudice the Virgin Mobile petition for Pennsylvania now that the PaPUC has asserted jurisdiction over wireless ETC designations in Pennsylvania.

²⁷ TracFone cannot be heard to raise concerns about the FCC acting *sua sponte* to remove a benefit when the benefit was obtained from a *sua sponte* action. However, since notice and comment on matters of general importance may warrant additional due process, the PaPUC suggests denial of similar forbearance petitions until the issue is resolved following a Notice of Proposed Rulemaking.

alternative, the PaPUC asks the FCC to deny pending and future forbearance petitions similar to TracFone's until the FCC addresses the issue of Forbearance from Section 254 and 47 CFR 54.201 after a Notice of Proposed Rulemaking.

The PaPUC further asks the FCC to hold that the April 2008 ETC Order does not apply to Pennsylvania. In the alternative, if the ruling does apply, the PaPUC asks the FCC to find that TracFone's actions warrant rescission or modification of that decision to TracFone and that the PaPUC should address future ETC designations and related matters in Pennsylvania.²⁹

Respectfully submitted,



Joseph K. Witmer, Assistant Counsel
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 787-3663
Email: jowitmer@state.pa.us

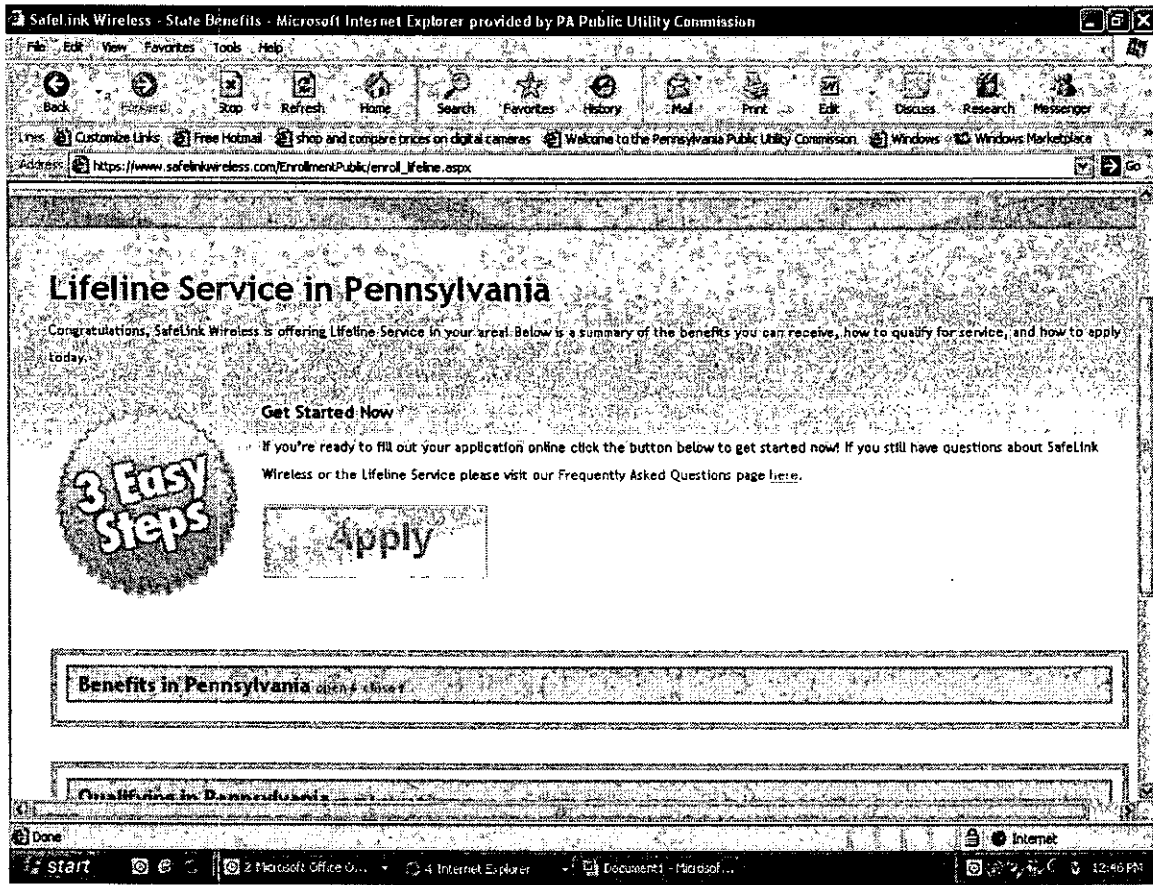
Dated: March 4, 2009

²⁸ *In the Matter of Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. for Forbearance from 47 U.S.C. 214(e)(1)(A) and 47 CFR 54.201(i)*, Docket No. 96-45 (September 8, 2005), paragraph 6, n. 23 (2005 Forbearance Order).

²⁹ *In the Matter of Joint Board on Universal Service, TracFone Wireless Petitions for ETC Designation in New York, Florida, Virginia, Connecticut, Massachusetts, Alabama, North Carolina, Tennessee, Delaware, New Hampshire, Pennsylvania, and the District of Columbia*, Docket No. 96-45 (April 9, 2008) (*The April 2008 ETC Order*). The April 3, 2008 Public Agenda Notice of the FCC, however, never listed Pennsylvania as a jurisdiction subject to action by the FCC on TracFone's ETC Petitions. The PaPUC did not file a detailed response to avoid even the appearance of impropriety that could arise from filing a response during the "blackout period" on a similar issue. The PaPUC only learned later upon issuance of the April 2008 ETC Order that the FCC included Pennsylvania.

ATTACHMENT A

Pgh-1



Pgh-2

SafeLink Wireless - State Benefits - Microsoft Internet Explorer provided by PA Public Utility Commission

File Edit View Favorites Tools Help

Back Forward Stop Refresh Home Search Favorites History Mail Print Edit Discuss Research Messenger

Links Customize Links Free Hotmail shop and compare prices on digital cameras Welcome to the Pennsylvania Public Utility Commission Windows Windows Marketplace

Address https://www.safelinkwireless.com/EnrollmentPublic/enroll_lifeline.aspx

SafeLink
WIRELESS

Check Status Service & Support Español GO

Learn
PROGRAM INFORMATION

Enroll
JOIN SAFELINK WIRELESS

Airtime
ADD OR BUY AIRTIME

Lifeline Service in Pennsylvania

Congratulations, SafeLink Wireless is offering Lifeline Service in your area! Below is a summary of the benefits you can receive, how to qualify for service, and how to apply today.

Get Started Now

If you're ready to fill out your application online click the button below to get started now! If you still have questions about SafeLink Wireless or the Lifeline Service please visit our [Frequently Asked Questions page here](#).

3 Easy Steps

Apply

start Microsoft Office 2003 Internet Explorer Document - Microsoft...

Internet 12:45 PM